Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

HELEN D. GENS,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION
(formerly RESOLUTION TRUST CORPORATION),

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case arose when the Petitioner, a Debtor-in-Possession under Chapter 11 of the Bankruptcy Code objected to the Proofs of Claim[1] of the Respondent wherein Petitioner maintained that the Respondent was barred when it sued the party from whom it had purchased the note for rescission of the sale of the note; that its Proofs of Claim filed after the bar date seeking to amend the claim of another party who had timely filed, were untimely; and that under Massachusetts Law the Respondent and its predecessors in title had impaired the collateral of the note and the Petitioner was discharged as an accommodation party on the note. The questions presented are:

1. Whether the United States Court of Appeals for the First Circuit erred in not following this Court's ruling in *United States v. Oregon Lumber Co.*, 260 U.S. 290, 43 S.Ct. 100, 67 L.Ed. 261 (1922) by allowing the Respondent to pursue inconsistent remedies by claiming on the note in this case after it had sought and obtained judgment on liability against the seller to it of the note by suing for rescission of the sale of the note.

2. Whether the United States Court of Appeals for the First Circuit erred in permitting the Respondent to amend a non-existing Proof of Claim after the bar date in disregard of this Court's holding in *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 164 (1914).

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[1] There were five Proofs of Claim filed on this claim, an original and four amendments.

QUESTIONS PRESENTED – Continued

3. Whether the United States Court of Appeals for the First Circuit erred in disregarding Massachusetts Law in determining Petitioner's impairment of collateral defense and employing a federal common law rule that would conform to the view adopted by most jurisdictions contrary to this Court's holding in *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 512 U.S. 79 (1994).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Helen D. Gens, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on May 5, 1997.

OPINIONS BELOW

The United States Bankruptcy Court for the Eastern District of Massachusetts on February 20, 1996, without opinion (App. 31), granted Respondent's[2] proof of claim on a note filed October 17, 1995, seventeen[3] months after the bar date of May 16, 1994. On August 16, 1996 the United States District Court for the District of Massachusetts affirmed the decision without opinion. (App. 30)

On May 5, 1997 the United States Court of Appeals for the First Circuit affirmed, 112 F.3d 569 (1997) ruling that the FDIC was not barred or estopped by its prior suit for the amount of the note (and receiving summary judgment on liability therein) against a prior holder of the note which sought rescission of the purchase of the note from the prior holder and "repurchase" for breach of

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[2] The Respondent was then the Resolution Trust Corporation, hereinafter referred to as "RTC".

[3] In its opinion the Circuit Court stated that the RTC delayed seven months in amending its proof of claim, however the record is clear that the final amended proof of claim was not filed until October 17, 1995 and was seventeen months after the bar date of May 16, 1994.

contract by the prior holder; that petitioner had no standing under the RTC regulations to challenge the status of the RTC agent in filing the proofs of claim; that the RTC could amend, after the bar date, a proof of claim timely filed by its agent as the agent's own proof of claim and filed in the agent's own name while the RTC, represented by counsel, had appeared in the case prior to the bar date and did not file a claim; and that the failure of the holders of the note to discharge a prior mortgage with the proceeds of the loan, and the failure of the RTC to acquire the collateral with the note, was not an impairment of collateral discharging the petitioner.

The Respondent filed a Motion to Modify the Opinion which was opposed by the Petitioner and the Court of Appeals denied the Motion to Modify. (App. 22, 27, 29)

JURISDICTION

Judgment of the United States Court of Appeals for the First Circuit was entered on May 5, 1997. This Court's jurisdiction to consider this petition from the final judgment or decree by a Circuit Court of Appeals is invoked pursuant to 28 U.S.C. 1254.

STATUTES AND RULES INVOLVED IN THIS CASE

The following statute contained in the Appendix is involved in this case:

11 U.S.C. 502 (App. 36)

The following Bankruptcy Rules contained in the Appendix are involved in this case:

Bankruptcy Rule 3001 (App. 41)

Bankruptcy Rule 3002 (App. 44)

Bankruptcy Rule 9010 (App. 45)

Bankruptcy Rule 9011 (App. 46)

The following Massachusetts Statutes contained in the Appendix are involved in this case:

Mass. G.L. c. 106 Sec. 3-415 (App. 49)

Mass. G.L. c. 106 Sec. 3-606 (App. 49)

Mass. G.L. c. 244 Sec. 17A (App. 50)

STATEMENT OF THE CASE

This case was commenced by a petition under Chapter 11 of the Bankruptcy Code, Title 11 U.S.C., in the United States Bankruptcy Court for the District of Massachusetts pursuant to 28 U.S.C. 157 and 28 U.S.C. 1334 on September 30, 1993. The Order of the Bankruptcy Court allowing the Proof of Claim of the Respondent was appealed to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. 158 on December 15, 1995. The Order of the District Court affirming the Bankruptcy Court was appealed pursuant to 28 U.S.C. 1291 to the United States Court of Appeals for the First Circuit on August 21, 1996. The facts of the case are:

On July 12, 1988 Helen D. Gens as trustee of the Old Jail Trust executed a note in the principal amount of $70,000.00 to U.S. Funding, Inc. of America secured by a mortgage on real estate in Barnstable, Massachusetts owned by the trust. Helen D. Gens also signed the note individually.

The trust was an irrevocable and unamendable trust with its own Federal ID number and the Debtor was not a beneficiary of the trust and received none of the proceeds of the loan.

On the face of the note, at the top, the Borrower was listed as the trust and the box to indicate a Coborrower was marked "N/A", i.e. inapplicable. On the bottom of the note appeared the language "This promissory note is secured by a mortgage on your real property". All of the signature lines on the note had the word "Borrower" printed underneath the signature lines. There was no printed line designated for an endorser or other accommodation party.

As security for the note the trust gave a mortgage on its Barnstable property. The Debtor was not a party to the Mortgage and was not an owner of the property.

There were two prior mortgages on the Barnstable property at the time of the execution of the note, a first mortgage to Home Owners Savings & Loan in the amount of $218,500.00, later the RTC, and a second mortgage to First National Bank of Boston in the amount of $36,000.00. As part of the $70,000.00 loan from U.S. Funding, Inc. of America the second mortgage to the First National Bank of Boston was to be paid and discharged so that the

property would only be encumbered by a first and second mortgage.

Immediately upon execution of the note and mortgage they were both assigned by U.S. Funding, Inc. of America to Key Financial Services, Inc.

In December of 1988 Home Owners Savings Bank, F.S.B., purchased the mortgage loan given by the trust from Key Financial Services, Inc. along with 334 other loans. The note was assigned by Key to Home Owners but the mortgage was not assigned.

On February 24, 1989 or on January 1, 1990[4] the note became due or went into default.

On October 20, 1989 Home Owners brought suit against Key in the United States District Court for the District of Massachusetts based on its rescission of the agreement to purchase the mortgage loans. On September 7, 1990 the RTC was substituted as plaintiff in that action.

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[4] In the first three proofs of claim it was asserted that the debt had become due on February 24, 1989. Thereafter the RTC alleged that the date of default was January 1, 1990. The difference in the dates does not effect the impairment of collateral defense as the date is the date on which the holder failed to perfect the security interest, and, as to the Statute of Limitations defense against Knutson the date is the date of the first mortgage foreclosure. However it is material to the opinion of the Court of Appeals that a default in January of 1990 constituted a legal wrong distinct and severable from the breach of contract by the prior holder as February 24, 1989 was prior to October 20, 1989. This date was changed seventeen months after the bar date in the fourth amendment to the claim and after the Debtor and another creditor had challenged the status of the RTC as a creditor.

On September 7, 1990 the RTC was made receiver of Home Owners and "Knutson Mortgage Corporation ("Knutson") was hired by RTC as servicing agent on the note and was given a limited power of attorney to act on behalf of RTC"[5].

On January 29, 1991 the RTC foreclosed by power of sale its first mortgage on the trust property in Barnstable[6] for $250,000.00. Therefore on January 29, 1993 the Massachusetts statute of limitations on any deficiency and on any amount owed to a junior lienholder had run. Mass. G. L. c. 244 sec. 17A.[7]

On January 30, 1992 United States District Judge Woodlock (Mass.) entered a memorandum and order in the case against Key granting the RTC partial summary judgment on its claims and ordering the parties to prepare a final judgment which would require Key to repurchase the loans, including this note, the subject of the Respondent's Proof of Claim.

On the back of the note in this case an endorsement was typed to endorse the note from the RTC to Key but

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[5] The Debtor contended that Knutson had been affiliated with an entity that caused substantial loss to federally insured funds and therefore was not in compliance with 12 CFR 1606.4 and could not be an agent for the RTC. The RTC claimed that Knutson could still have qualified by filings approved by the Contractors Committee but offered no evidence that it had. Evidentiary hearings were refused and denied on this issue also.

[6] Since there was no evidentiary hearing there was no accounting of the $250,000.00 received at the foreclosure sale and Debtor was precluded from contesting the same.

[7] Except as to the RTC and FDIC.

no signature appears thereon. This case is still pending as of this writing.

The mortgage to the First National Bank of Boston was never discharged of record. The mortgage securing this note was never assigned by Key Financial Services to the RTC's ward and is still, as of record, held by Key Financial Services.

On September 30, 1993 Helen D. Gens filed a Petition under Chapter 11 and on October 15, 1993 filed her schedules. In her schedules accompanying the petition she did not list the Resolution Trust Corporation, Knutson Mortgage Corporation, Key Financial Services, Inc., nor U. S. Funding Inc. of America as a holder of a certain mortgage note signed by her as Trustee of the Old Jail Trust and individually.

On November 12, 1993 the Resolution Trust Corporation filed its appearance without a proof of claim.

On December 6, 1993 Knutson, in its own name and in its own right, filed a secured proof of claim, based on the real estate mortgage granted by Helen D. Gens as trustee of the Old Jail Trust and not individually. This proof of claim was executed not by counsel for the RTC, whose appearance for the RTC was still in effect, but by an officer of Knutson. Attached to the proof of claim was the face of the note and the mortgage of the trust. The back of the note was not attached and the holder of the note on its face was U.S. Funding, Inc. of America. The only indication that it was held by any other party was the proof of claim itself wherein Knutson claimed to own the mortgage securing the note, and therefore, inferentially, claimed ownership of the note itself.

The Knutson Proof of Claim specifically averred that Knutson was the creditor; (Name of Creditor Box) that the basis of the claim was a real estate mortgage with a property address at 381 Old Jail Lane, Barnstable, MA 02630; (Box 1) the debt was incurred on February 24, 1989; (Box 2) and was classified as a secured claim (Box 4). It was signed by Thomas P. Farrell, First Vice President (of Knutson).

On January 18, 1994 the Debtor filed a motion for leave to sell real estate. The motion was granted on January 28, 1994.

On March 2, 1994 Richard H. Gens, the Debtor's husband, filed a Proof of Claim claiming homestead rights under Florida law in his wife's, the Debtor's, real estate. On April 5, 1994 the Debtor filed a Motion to Set Bar Date which was granted setting a Bar Date of May 16, 1994. The RTC as a party appearing received notice of the Bar Date.

On October 18, 1994 petitioner, the Debtor, Creditor NationsBank Mortgage Corporation, and Creditor [Claimant] Richard H. Gens filed a Settlement Agreement in the Bankruptcy Court settling their respective claims to the proceeds of the sale of petitioner's Florida homestead. On October 25, 1994 the RTC filed a Motion to Convert the Case to Chapter 7 and on October 27, 1994 filed an objection to the claim of Richard H. Gens. On October 31, 1994 Richard H. Gens filed an objection to RTC's objection to his claim and on November 10, 1994 the petitioner filed her objection to the Motion to Convert, all of the objections asserting that the RTC was not a creditor and that the bar date had passed.

As a result of the foregoing the RTC on November 22, 1994 withdrew its Motion to Convert and on November 28, 1994 withdrew its objection to the claim of Richard H. Gens.

On November 30, 1994 Knutson, on behalf of the RTC, filed a secured proof of claim based on the mortgage given by Helen D. Gens as trustee of the Old Jail Trust and not individually, asserting that this proof of claim amended the Knutson Proof of Claim previously filed.

This proof listed the RTC as the creditor but the address for notices box remained the same, addressed to Knutson; the basis of the claim was a real estate mortgage on property at 381 Old Jail Lane, Barnstable, MA 02630; (Box 1) it was classified as a secured claim (Box 4) and the date the debt was incurred was February 24, 1989. (Box 2) The amended box was checked on the Proof of Claim but it did not refer to the claim it was amending.

This claim also was only against the trust, the sole party to the mortgage claimed on.

On December 14, 1994 yet another Proof of Claim was filed this time naming the Resolution Trust Corporation as Receiver of Home Owners Savings Bank, F.S.B. as the creditor and with notices to be sent "c/o Knutson Mortgage Corporation".

This proof was checked as replacing the claim of November 30, 1994 and amending the previously filed claim dated December 6, 1993. This was now an unsecured nonpriority claim (Box 4) for money loaned (Box 1) the debt being incurred on February 24, 1989. (Box 2)

Attached to the Proof of Claim was a statement that reiterated the replacement and amendment and that it was filed to "Correct a technical defect". It was further stated that it was filed to:

> "Reflect *a change in the claim's status from secured to unsecured* as a result of a foreclosure . . . " (underline added)

On the same date, August 14, 1995, the RTC filed its response to the Debtor's objections. For the first time the RTC produced the back of the note showing the assignment of the note to Key Financial Services and thence to Home Owners Savings Bank, F.S.B.

On October 17, 1995 the RTC filed another amended Proof of Claim which asserted it was an unsecured claim for money loaned on a note and attached the front and back of the note and alleged for the first time that the note became due in January of 1990.

The Debtor filed separate objections to each of the Proofs of Claim. As to the Knutson claim the Debtor objected *inter alia* that the claimant "Claimant's Proof of Claim states no basis for Claimant having a claim against the Debtor" and "has annexed no documents to its Proof of Claim to show that it *has a claim against the Debtor.*" (underline added), was barred by the Statute of Limitations and that the promissory note had been discharged.[8]

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[8] Debtor also claimed no itemization of the claim, the payee and holder on the face of the papers then on file was not the claimant but a bankrupt entity, unclean hands, estoppel and payment. The basic defect of the claim however was that it was nonexistent and as later events proved was not owned by this claimant.

Debtor's objection to the Proof of Claim of November 30, 1994 filed by Knutson and naming the RTC as the creditor and stated as an amendment to some prior claim was based *inter alia* on the fact that it was filed after the Bar Date and that "It would be unfair to creditors . . . " The Debtor reiterated its objection that there were no documents to show the claimant had a claim against the Debtor. She also objected that Knutson did not have standing to bring a Proof of Claim on behalf of the RTC.

Debtor's objection to the Proof of Claim filed December 14, 1994 filed by Knutson for the RTC as a replacement to the November 30, 1994 Proof of Claim stated *inter alia* that it was time barred by the Bar Date, was unfair to creditors to allow the same after the Bar Date, that the prior proofs were filed by entities other than the Claimant and that the prior claims were filed as secured claims whereas this claim was filed as an unsecured claim. The Debtor reiterated her objections to the prior claims. (R. II-29)

On August 14, 1995, creditor James Gens filed objections to the three Proofs of Claim. The objections to the Knutson claim was based *inter alia* on the Statute of Limitations, the claimant was not the holder and that the Debtor was an accommodation maker and that the holders had impaired the collateral.

James Gens' objections to the RTC claims were based *inter alia* on the grounds that the claims were filed after the Bar Date and "they prejudice the rights of the creditors who have timely filed claims"; that Knutson had no standing to bring the claims on behalf of the RTC under

12 C.F.R. 1606; and that RTC could not amend the Knutson claim. James Gens relied on the decision of the United States Supreme Court in *United States ex rel. Texas Portland Cement v. McCord,* 233 U.S. 157 (1914) and its progeny that an amendment to a nonexistent claim cannot be made to relate back.

James Gens further asserted that the allowance of a new unsecured claim by amending a prior secured claim results in unfair prejudice to other holders of unsecured claims. James Gens specifically requested in his objections an evidentiary hearing on disputed facts.

On the same date, August 14, 1995, the RTC filed its response to the Debtor's objections. For the first time the RTC produced the back of the note showing the assignment of the note to Key Financial Services and thence to Home Owners Savings Bank, F.S.B.

The RTC filed its response to the objections of James Gens.

As a result of the production of the back of the note James Gens filed amended objections to the proofs of claim setting forth in detail the impairment of the collateral by the holders of the note in that they failed to perfect the security interests in the collateral. Again James Gens requested an evidentiary hearing on disputed facts.

The RTC filed a response to James Gens' amended objections.

On October 11, 1995 a hearing was held on the objections and the court ordered the RTC to file an amended claim by October 31, 1995.

The objections of James Gens were overruled.

On October 17, 1995 the RTC filed another amended Proof of Claim.

On October 20, 1995 the Debtor filed her objection to the RTC amended claim of October 17, 1995. This objection asserted once again that the Debtor was an accommodation party and was discharged by the impairment of the collateral, that Knutson lacked standing to file the Proofs of Claim on behalf of the RTC, and that the RTC claim was time barred and the Knutson claim could not be amended as it was a nonexistent claim and this was a new claim. The Debtor also objected to the itemization.

On November 21, 1995 the Debtor filed a Supplemental Objection based on newly discovered evidence that the RTC had a case pending before Judge Woodlock in the District Court to rescind the assignment of 335 mortgage loans, including specifically this note upon which the proof of claim was based, and that summary judgment had been awarded granting the rescission with final judgment pending. The Supplemental Objection asserted *inter alia* Judicial Estoppel and Collateral Estoppel.

Over the objections of the petitioner this claim was allowed without an evidentiary hearing and the claims of the petitioner that the amendment was time barred, that Knutson had no standing to represent the RTC; that the RTC was judicially estopped and barred by the doctrine of election of remedies, and that her collateral had been impaired discharging her as an accommodation maker on the instrument, were overruled without opinion.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the United States Court of Appeals for the First Circuit has failed to adhere to the decisions of this Court in deciding three important issues under the Bankruptcy Code. The decision of the Court of Appeals was not only unjust in that it permitted an adjudicated wrongdoer (Key Financial Services, Inc.) to benefit from the special status conferred on the RTC (and the FDIC) to the detriment of the Debtor and her creditors, but the Court of Appeals decision conflicts with that of the Fifth Circuit in *Highlands Insurance Company, Inc. v. Alliance Operating Corp.*, 60 F.3d 1175 (5th Cir. 1995) and decides an important question of federal bankruptcy law (the preclusive effect of the bar date) that has not been settled by this Court. In addition the Court of Appeals did not follow the relevant Massachusetts cases on the issue of the impairment of collateral defense but used a rule adopted by a majority of other jurisdictions.

1. The Circuit Court of Appeals did not follow this Court's ruling in *United States v. Oregon Lumber Co.*, 260 U.S. 290, 43 S.Ct. 100, 67 L.Ed. 261 (1922).

The issue presented in this case was whether a party may seek in two separate actions to rescind the sale to it of a note and demand its money back from the seller/payee, and, at the same time in another action (affirming the sale of the note) seek to collect it from the maker.

As the RTC stated in its response to the Debtor's Supplementary Objection:

> "RTC is seeking to force a rescission of the note assignment which would result in a transfer to Key of the note and the attendant claim against

> the debtor . . . Any payment by Key to RTC will be in connection with the rescission of the note assignment . . . The debtor's liability under the note will not be paid or satisfied, it will simply become a liability to Key rather than to RTC."

Not only is this a distinction without a difference it points out the inequity of permitting the RTC to exercise inconsistent remedies as Key will receive an allowed claim obtained by virtue of the RTC's special Statute of Limitations which would otherwise be barred by the Massachusetts Statute of Limitations of two years. Mass., G.L. c. 244, s.17A. Key will further receive an allowed claim that could not be contested due to Key's failure of furnishing consideration. The net result is that Key, the wrongdoer, who breached its contract and misrepresented the note, will be rewarded by virtue of the RTC efforts to establish, in effect, Key's claim, its own claim already having been established against Key on partial summary judgment.

This Court has ruled that when a party rescinds a contract he cannot thereafter make use of it as subsisting for the purpose of suing for damages. *United States v. Oregon Lumber Co., supra.* A final and decisive choice of the equity remedy by way of rescission and cancellation operates as an election of remedies and bars a subsequent action at law for damages. *Id.*

As the court stated in *Oregon Lumber* at page 294:

> "Upon the facts stated the sale was voidable (*Moran v. Horsky*, 178 U.S. 205, 212), and the plaintiff in error was entitled either to disaffirm the same and recover the lands or affirm it and recover damages for the fraud. It could not do

> both. Both remedies are appropriate to the facts, but they were inconsistent since the first was founded upon a disaffirmance and the second upon an affirmance of a voidable transaction. *Robb v. Vos*, 155 U.S. 13, 43; *Counihan v. Thompson*, 111 Mass. 270, 272. 2 Black on Rescission and Cancellation, #562, and cases cited."

Where a party has grounds to bring different actions out of the same state of facts against different persons and the maintenance of one action necessitates the allegation of a fact inconsistent with the maintenance of another, he is bound by his election and cannot proceed against the other person. *Henderson Tire & Rubber Co. v. Gregory*, 16 F.2d 589, 49 ALR 1503 (8th Cir. 1928).

In *Robb v. Vos*, 155 U.S. 13 (1894) the party attacking the sale failed because he had theretofore made a choice of an alternative substantive right by filing an answer and cross petition in another suit ratifying Kebler's (the agent) want of authority and therefore made the title of Vos and Stix (the purchasers) good. In *Stuart v. Hayden*, 160 U.S. 1 (1898) commencement of an action for the purchase price of property was held to have ratified a sale of real estate which plaintiff later attempted to rescind. In *Counihan v. Thompson*, 111 Mass. 270, cited by both the *Robb v. Vos* and *Oregon Lumber* courts the Massachusetts Supreme Judicial Court stated at p. 272:

> "The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such case any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of

> the parties once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election to affirm or disaffirm a voidable contract or sale or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action brought thereon."

In the Key case the RTC expressly disaffirmed the assignment to it of the note claimed on herein and received summary judgment thereon. The instant claim on the note in this Bankruptcy is patently inconsistent and repugnant to its election in this court in the Key case. The Circuit Court was bound to follow this Court's ruling in *Oregon Lumber.*

Inconsistent remedies are "determined by the bringing and maintenance of the suit, not by the final disposition of the case by the court." *Oregon Lumber, supra* at 301.

The RTC Proof of Claim was therefore barred by the doctrine of Election of Remedies and Judicial Estoppel as it had received a summary judgment rescinding its purchase of the note and its claim against the Debtor was based on being the lawful holder thereof, positions clearly inconsistent and repugnant to each other.

In addition, as noted herein, the Debtor and the other unsecured creditors are prejudiced by this change of position in that she has valid defenses against Key and a valid Statute of Limitations defense against Key as the holder. The two year limitation on suits after foreclosure for a deficiency or by a secondary mortgage holder under Mass. G.L. c. 244 s. 17A had expired prior to the bankruptcy petition.

2. The Circuit Court of Appeals did not follow this Court's reasoning in the case of *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 164 (1914) and permitted the amendment of a non-existent claim after the bar date.

All of the Proofs of Claim filed by the RTC were filed after the Bar Date and after the Debtor and other claimants raised the Statute of Limitations against Knutson. The Proofs of Claim were therefore time-barred. As the following analysis shows these proofs can not be treated as amendments of Knutson's timely filed claim because, admittedly, Knutson did not have a claim, the Knutson claim was a secured claim against another party, not the Debtor, and was therefore a new claim. In addition their allowance as an amendment prejudiced the Debtor and the other unsecured creditors.

In the case of *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 164 (1914). This Court ruled in a case where an original suit had been prematurely brought as the cause of action had not then accrued, an amendment after the time to sue had expired would not lie. As the court stated:

> "As to the effect of the filing of the amendment by the original plaintiffs on January 9, 1911, it is elementary that an amendment dates back to the filing of the petition and is to supply defects in the cause of action which existed at the beginning of the case. *In this case there was no cause of action to amend.* Nor was the amendment of January 9, 1911, the introduction of a new cause of action existing at the beginning of the suit. See in this connection *American Bonding & Trust Co. v. Gibson County*, 145 Fed. Rep. 871 (Circuit Court of Appeals for the Sixth Circuit, opinion

> by Mr. Justice Lurton). If this amended petition can be regarded as an intervention in a pending suit, and it is contended that it may be, it was too late, as it was filed more than a year after the final settlement under the contract to which such rights of action are limited by statute. *Eberhart v. United States*, 104 Fed. Rep. 884. *The same objection would lie if the amended petition could be regarded as the bringing of an original suit.* See *Baker Contract Co. v. United States*, 204 Fed. Rep. 390" (*italics added*)

This doctrine has been cited with authority in recent cases. In *Kelly v. Carr*, 691 F.2d 800 (6th Cir. 1980) the court stated at 806:

> "Because intervention presumes a valid lawsuit in a court of competent jurisdiction, ordinarily the intervening party cannot breathe life into a non-existing action.[17]"

> [17]. *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893 (1914)

In footnote 4 to its opinion in *Benavidez v. Eu*, 34 F.3d 825 (9th Cir. 1994) the Ninth Circuit reiterated the holding. And the Ninth Circuit in *U.S. for use and benefit of Wulff v. CMA, Inc.*, 890 F.2d 1070 (9th Cir. 1989) stated:

> "A similar conclusion was reached by the United States Supreme Court in *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893 (1914). In *McCord* the Court refused to allow an amended complaint to relate back to a nonexistent cause of action . . . In the present case it is clear that the only party entitled to sue under the Miller Act

> at the time the Wulffs filed their original complaint was B&K, the subcontractor who had supplied labor and materials to the federal construction project . . . B&K's assignment to the Wulffs of its claim against CMA cannot ratify the Wulffs' commencement of suit on a claim which therefore did not exist."

This doctrine was followed in *In Re Ellington*, 151 B.R. 90 (Bkrtcy W.D. Tex. 1993) a case extremely similar to the instant case where NCNB, the owner of the claim, sought to amend the claim of First Republic, who did not own the claim. NCNB had bought the claim prior to First Republic's filing of the Proof of Claim in the Bankruptcy Court. NCNB filed an amended claim as the successor by merger of First Republic. The Bankruptcy Court in denying the amendment stated:

> "In addition to the *timely* filing of a proof of claim, it is also essential to the allowance of an amendment that the original proof of claim be *properly* filed by the party seeking the amendment. The proper filing of an original proof of claim is fatally absent in NCNB's argument. NCNB sought to amend the First Republic Proof of Claim, timely filed on August 16, 1988.[6] Here, when First Republic filed its original proof of claim, it did not *own* any claims against the Debtor's bankruptcy estate . . . The defunct First Republic was not a "creditor" of the Debtor on August 16, 1988, and therefore the First Republic Proof of Claim was not "properly filed", as First Republic could not legitimately even *sign* a proof of claim representing that it owned a claim against the estate (for it did not).[8] Absent a claim properly filed *by NCNB* (the owner of the claim), NCNB had no proof of claim to

amend. *See Matter of Paul R. Dean Co., Inc.*, 460 F.Supp. 447, 456 (W.D.N.Y. 1978) "[A]n absolute prerequisite to allowance of an amendment is the existence of something filed in the bankruptcy court *capable of being amended.*" *In Re W.T. Grant Co.*, 53 B.R. 417, 420 (Bankr.S.D.N.Y. 1985) (emphasis added); *see also In Re South Atlantic Financial Corp.*, 767 F.2d 814, 819 (11th Cir. 1985) *cert. denied*, 475 U.S. 1015, 106 S.Ct. 1197, 89 L.Ed.2d 311 (1986) (before court can permit amendment, something capable of amending must be filed).

Therefore, the court concludes that since the First Republic Proof of Claim was improperly filed, it follows, *a fortiori*, that the Amended Proof of Claim offered by NCNB was ineffective, as it had nothing to amend.[9]"

In the instant case Knutson did not own the claim which it filed in its own right. Therefore it was improperly filed as a nonexistent claim

As further evidence that this claim was not the claim of the RTC being filed by its alleged agent, Knutson, is the fact that it was filed by Knutson itself and not by the attorney for the RTC who had earlier entered his appearance for the RTC. If Knutson was filing as the agent of the RTC it should have disclosed that on the Proof of Claim and had the Proof of Claim executed by the attorney of record of the RTC, who had already appeared, otherwise it was in direct violation of Bankruptcy Rule 9011.

In addition the claim sought to be amended, the Knutson Claim, was a claim, not against the debtor, but a claim against an irrevocable unamendable trust, not a debtor in these proceedings, as it was a claim on a "Real

Estate Mortgage" as to which the Debtor was not a party. It is a new claim for "Money Loaned" as distinguished from the original secured claim filed by Knutson in its own right, being now an unsecured claim brought against a surety on the instrument. See, *Highlands Insurance Company, Inc. v. Alliance Operating Corp.*, 60 F.3d 1175 (5th Cir. 1995).

The Fifth Circuit ruled in a case involving an amendment from an unsecured claim to a priority claim:

> "Bar dates, however, are not to be vitiated by amendments, and the courts must ensure that the amendments do not introduce wholly new grounds of liability. In Re Kolstead, 928 F.2d at 175. Amendments to proofs of claim that change the nature of the claim from an unsecured status to a priority status set forth a new claim. In Re Walls & All, Inc., 127 B.R. 115, 118 (Bankr.W.D.Pa. 1991); In Re Metro Transportation Co., 117 B.R. 143, 148 (Bankr.E.D.Pa. 1990). The court in In Re Metro Transportation Co. reasoned: [T]he nature of a priority claim is much different from that of a general unsecured claim. Reclassifying the claim as a priority claim impacts the Debtor's Plan and the distributions to be paid to the other creditors under the Plan. This situation is therefore different from those in which amendments have been permitted to increase the amount of a claim when post-bar date events have resulted in a larger, but otherwise unchanged debt . . . A priority claim is a claim completely different from that asserted by the Fund in its timely proofs of claim. The Fund's desire to reclassify its Claim is therefore an attempt to assert an untimely new claim."

Secured creditors are entitled to realize on their security and will be permitted to do so in bankruptcy, therefore as to the Debtor[9] and the unsecured creditors their interest in the unencumbered assets of the bankruptcy estate will only be diminished to the extent of any deficiency to which a secured creditor may become entitled to. By permitting one who claimed as a secured creditor to now waive its security and come in as an unsecured creditor a totally new claim is being presented after the Bar Date. Reclassifying the secured claim as an unsecured claim impacts the distributions to be paid to the other unsecured creditors. By allowing a secured claim to be reclassified as an unsecured claim after the Bar Date makes fewer assets available to the other unsecured creditors.

Viewed from the perspective of a creditor whose claims may be affected by a change in the distribution resulting from the amendment the change is significant in this case and doubles the amount of the unsecured claims cutting in half any dividend they would otherwise have received.

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[9] The Debtor, *qua* Debtor, was prejudiced by the fact that she was relying on the Statute of Limitations having run against Knutson. The conversion of a secured claim to an unsecured claim prejudiced the unsecured creditors, who, relying on the representation that the claim was secured, were now prejudiced by the change. Bearing in mind that the record shows that the RTC claimed to hold 50% of the unsecured claims by the virtue of its amendment, the change was significant. The Debtor, in the absence of a Trustee, *qua* Trustee, therefore represented the interests of the unsecured creditors and was duty bound to contest this increase in the claims to the unencumbered estate.

3. The Circuit Court of Appeals erred in deciding the impairment of collateral defense on the basis of the majority view of other jurisdictions thereby invoking a federal common law in disregard of *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 512 U.S. 79 (1994).

Massachusetts Statutory and Case Law is clear that under the Uniform Commercial Code, G.L. c. 106, §§ 3-415 & 3-606, an accommodation party is always a surety and all suretyship defenses are available to a party in that position. See, *Rose v. Homsey*, 347 Mass. 259, 197 N.E.2d 603, 606-607 & n. 5, 6 (Mass. 1964). The defense of impairment of the collateral was also not waived in the Note instrument.

When the Note was executed, there was an existing second mortgage in the property to the First National Bank of Boston in the amount of $36,000.00, which was paid from the proceeds of the loan. Neither the payee nor any of the subsequent holders of the Note ever obtained a discharge of that second mortgage. The second mortgage securing the Note was never assigned to the claimants from Key Financial Services, Inc. When a payee on a Note, without the consent of the surety, impairs the collateral given as security, the surety is discharged to the extent that the collateral is impaired. *Rose*, 197 N.E.2d at 605.

This rule has been applied to situations where a payee has impaired the collateral by failing to record a mortgage. *Id.* at 605-606, *Providence Fall River & Newport Steamboat Co. v. Massachusetts Bay S.S. Corp.*, 38 F.2d 674, 676 (D. Mass). See also, *Shaffer v. Davidson*, 445 P.2d 13, 5

UCC 772 (Wyo. 1968) (accommodation party stated meritorious defense claiming impairment of collateral where plaintiff failed to perfect security interest; court sets off value of the property against the face amount of the note). See generally, *President of American Bank v. Baker*, 4 Metc. (Mass.) 164 (1842) (where bank-holder compromised collateral securities given to secure a note without consent of accommodation maker of the note, bank thus discharged accommodation party).

As the record clearly shows a prior mortgage on the property was supposed to be discharged from the proceeds of this loan. This prior loan was never discharged.

The Debtor was discharged on the note because the Debtor was an accommodation maker of the note and the transfer of the note by Key Financial Services, Inc. to the claimant without an assignment of the mortgage and a discharge of the mortgage to the First National Bank of Boston impaired the collateral for the note as there was a failure to perfect the security for the note.

The Circuit Court of Appeals instead of applying Massachusetts law as enunciated in *Rose v. Homsey*, 197 N.E. 2d 603 (Mass. 1964) and *Providence, Fall River & Newport Steamship Co. v. Massachusetts Bay S.S. Corp.*, 38 F.2d 674 (D. Mass. 1930) invoked a federal common law based on the opinions of the "clear majority" of the states.

CONCLUSION

For all the reasons stated, Petitioner, Helen D. Gens, prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 96-2009

IN RE HELEN D. GENS, d/b/a
HELEN GENS AND ASSOCIATES,

Appellant,

v.

RESOLUTION TRUST CORPORATION
(Federal Deposit Insurance Corporation),

Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
[Hon. Reginald C. Lindsay, *United States District Judge*]

Before

Selya, *Circuit Judge*,

Cyr, *Senior Circuit Judge*,

and Stahl, *Circuit Judge*.

Richard H. Gens for appellant.

Barbara R. Sarshik, Counsel, FDIC, with whom *Ann S. DuRoss*, Assistant General Counsel, FDIC, *Thomas L. Hindes*, Senior Counsel, FDIC, *Joseph G. Butler*, and *Barron & Stadfeld* were on brief for appellee.

May 5, 1997

CYR, *Senior Circuit Judge.* Chapter 11 debtor-in-possession Helen D. Gens ("Gens") challenges a bankruptcy court order which allowed the Federal Deposit Insurance Corporation ("FDIC") to amend its proof of claim following the bar date for filing claims. We affirm.

I

BACKGROUND

In July 1988, Gens executed a promissory note ("the Gens Note") payable to U.S. Funding Inc. of America ("U.S. Funding") in the principal amount of $70,000, by signing it both in her "individual" capacity and in her representative capacity as trustee for the Old Jail Trust ("Trust"). The Gens Note was secured by a third mortgage on real property in Barnstable, Massachusetts, owned by the Trust ("the Barnstable Property"). Although the Barnstable Property was subject to two prior mortgages, U.S. Funding and Gens allegedly arranged for $36,000 of the $70,000 in loan proceeds to be used to satisfy the preexisting second mortgage. U.S. Funding promptly assigned the Gens Note to Key Financial Services ("Key"), which assigned it to Home Owners Savings Bank ("Home Owners").

In October 1989, Home Owners commenced suit against Key in federal district court, alleging that the purchase-sale agreement, whereby Home Owners acquired the Gens Note from Key, had been induced by

fraud *or* that Key had breached its title-insurance provisions. Home Owners demanded either rescission or damages for breach of contract.

The Trust defaulted on the Gens Note in or about January 1990 and the first mortgagee foreclosed on the Barnstable Property. The foreclosure sale resulted in no surplus for application to any junior lien, including the third mortgage securing the Gens Note. In September 1990, Home Owners was declared insolvent and the Resolution Trust Corporation ("RTC") was appointed receiver. RTC designated Knutson Mortgage Corporation ("Knutson") as its servicing agent on the Gens Note, and gave Knutson a limited power of attorney.

Meanwhile, in the ongoing federal action brought by Home Owners against Key, the district court entered partial summary judgment for RTC and Home Owners, finding that Key had breached the purchase-sale agreement. The attendant district court order directing Key to repurchase the Gens Note never became final, however, apparently because RTC and Key were unable to agree upon a repurchase price.

Gens commenced a voluntary chapter 11 proceeding in September 1993, but failed to schedule the Gens Note as a liability. Knutson, as RTC's agent, filed a proof of claim ("POC") in relation to the Gens Note in December 1993 ("original POC"), well before the May 16, 1994 bar date for filing claims. The original POC incorrectly listed Knutson itself as the creditor, failed to disclose that Knutson was the authorized RTC servicing agent, mischaracterized the claim as secured, and mistakenly identified

February 24, 1989 (rather than July 1988) as the date Gens incurred the Gens Note obligation.

Almost seven months after the bar date, Knutson filed an amended POC in relation to the Gens Note, correctly listing RTC as the creditor, but still (i) failing to disclose that Knutson was RTC's agent, and (ii) incorrectly characterizing the claim as "secured." Knutson eventually submitted additional amended POCs correcting these deficiencies.

Gens objected to the original and amended POCs, asserting *inter alia* judicial estoppel and discharge of the note, *see* Mass. Gen. Laws Ann. ch. 106, § 3-606. While these objections were pending, FDIC, successor to RTC, was substituted as the creditor on all POCs filed by Knutson. Ultimately, the objections to the original and amended POCs were rejected by the bankruptcy court and the district court affirmed.

II

DISCUSSION

A. Judicial Estoppel

The companion doctrines of judicial estoppel and election of remedies[1] essentially preclude a party from asserting a legal or factual position "inconsistent" with its position in a prior proceeding. *See Patriot Cinemas, Inc. v.*

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[1] The "election of remedies" defense likewise derives from the equitable doctrine of estoppel. *See Butcher v. Cessna Aircraft Co.*, 850 F.2d 247, 248 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989); *In re Leonardi's Int'l, Inc.*, 123 B.R. 668, 669 (Bankr. S.D. Fla. 1991).

General Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987). The estoppel defense advanced by Gens is predicated entirely on the contract-rescission claim Home Owners asserted in the federal court action against Key, alleging *inter alia* that Key had made material misrepresentations in negotiating the purchase-sale agreement. Implicit in Home Owners' demand for rescission of the purchase-sale agreement was its averment that Key's fraud rendered the purchase-sale agreement voidable *ab initio*, and therefore that Home Owners never became a "holder" of the Gens Note. *See, e.g., In re Southern Indus. Banking Corp.*, 46 B.R. 306, 313 (Bankr. E.D. Tenn. 1985) ("A party to a transaction induced by fraud may elect between two remedies – he may treat the contract as voidable and sue for the equitable remedy of rescission or he may sue for damages at law under the tort theory of 'deceit.' ").

In January 1992, the district court awarded summary judgment to RTC on its contract claim. Gens now contends, therefore, that FDIC is estopped from asserting a claim under the Gens Note in her bankruptcy proceeding, since its POC is legally and factually inconsistent with the litigation position adopted by Home Owners in the district court action, namely, that Home Owners never became a holder of the Gens Note because the purchase-sale agreement was rescindable from its inception. We disagree.[2]

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[2] Although Gens argues that the bankruptcy court decision must be reviewed *de novo*, we have yet to determine the exact standard for reviewing applications of the doctrine of judicial estoppel. *See Desjardins v. Van Buren Community Hosp.*, 37 F.3d 21, 23 (1st Cir. 1994) (expressly reserving question); *cf. McNemar v. Disney Store, Inc.*, 91 F.3d 610, 613 (3d Cir. 1996) (adopting

Judicial estoppel is not implicated unless the first forum *accepted* the legal or factual assertion alleged to be at odds with the position advanced in the current forum:

> [W]here a party assumes a certain position in a legal proceeding, and *succeeds* in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. . . . Judicial estoppel should be employed when a litigant is "playing fast and loose with the courts," and when "intentional self-contradiction is being used as a means of *obtaining* unfair advantage in a forum provided for suitors seeking justice."

Patriot Cinemas, 834 F.2d at 212 (emphasis added) (citations omitted).[3] Similarly, the primary purpose served by

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"abuse of discretion" standard), *cert. denied*, 117 S.Ct. 958 (1997); *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996) (same); *Yanez v. United States*, 989 F.2d 323 (9th Cir. 1993) (same). "In reality, judicial estoppel is not extrinsically a matter of fact or law; the issues that arise may turn out to be ones of raw fact, abstract law, or something in between, e.g., the application of a general standard to a known set of facts." *Desjardins*, 37 F.3d at 23. It is not necessary to determine the precise standard of review at this juncture, however, since the bankruptcy court ruling would be affirmed even on plenary review. *See id.*

[3] *See United States v. Levasseur*, 846 F.2d 786, 793 (1st Cir.) (estoppel applies where party previously "obtained a litigation benefit"), *cert. denied*, 488 U.S. 894 (1988); *see also Continental Ill. Corp. v. Commissioner*, 998 F.2d 513, 518 (7th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994) (party must have "sold" its position to prior tribunal); *Wang Labs., Inc. v. Applied Computer Sciences, Inc.*, 958 F.2d 355, 358 (Fed. Cir. 1992); *In re A. Barletta & Sons, Inc.*, 185 B.R. 976, 980 (Bankr. M.D. Pa. 1995); *In re Pierce Packing*

the "election of remedies" doctrine is "to prevent double [*viz.*, sequential] recoveries for the same wrong." *Tavormina v. Fir, Inc. (In re Alchar Hardware Co.)*, 764 F.2d 1530, 1534 (11th Cir. 1985).

Contrary to Gens' contention, RTC permissibly displaced its contract-rescission claim by moving for partial summary judgment on its alternative claim that Key had breached the purchase-sale agreement. *See* Fed.R.Civ.P. 8(e)(2) ("A party may also state as many separate claims [in its complaint] . . . as the party has[,] regardless of consistency. . . . ").[4] Under an express provision in the

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Co., 169 B.R. 421, 429-30 (Bankr. D. Mont. 1994); *In re UNR Indus., Inc.*, 143 B.R. 506, 526 (Bankr. N.D. Ill. 1992), *vacated on other grounds*, 173 B.R. 149 (N.D. Ill. 1994); *Phillips v. FDIC (In re Phillips)*, 124 B.R. 712, 719 (Bankr. W.D. Tex. 1991); *In re Merritt Logan, Inc.*, 109 B.R. 140, 147-48 (Bankr. E.D. Pa. 1990); *cf. also Crown Life Ins. Co. v. American Nat'l Bank and Trust Co. of Chicago*, 35 F.3d 296, 299 (7th Cir. 1994) ("An election of remedy occurs only when a party accepts the benefit of pursuing the initial remedy."); *Leonardi's Int'l, Inc.*, 123 B.R. at 669 ("An election . . . between legally inconsistent remedies can be made at any time prior to the entry of [final] judgment."); *Collomb v. Wyatt (In re Wyatt)*, 6 B.R. 947, 951-52 (Bankr. E.D.N.Y. 1980) (" 'The purpose of [the] doctrine [of election of remedies] is not to prevent recourse to any remedy, but to prevent double redress for a single wrong.' ") (citation omitted).

[4] *See, e.g., Desjardins*, 37 F.3d at 23 ("There are many situations, especially at the outset of litigation, where a party is free to assert a position from which it later withdraws – or even to assert, in the alternative, two inconsistent positions of its potential claims and defenses."); *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 415 (Fed.Cir. 1988) ("With the enactment of the Federal Rules of Civil Procedure, the traditional election doctrine was relaxed."); *Grogan v. Garner*, 806 F.2d 829, 838 (8th Cir. 1986) ("[T]he doctrine [of election] is

purchase-sale agreement, the exclusive remedy for its breach was the repurchase of the Gens Note by Key upon demand by Home Owners. Thus, unlike a rescindment, which necessarily presumes a disaffirmance of the purchase-sale agreement by Home Owners *ab ovo*, the RTC breach-of-contract claim implicitly acknowledged a valid contract whereby Home Owners became the holder of the Gens Note until Key repurchased the Note. Accordingly, the current FDIC litigation position is not inconsistent with that advanced by its predecessor, RTC, since Home Owners and RTC failed to persuade the district court that the purchase-sale agreement was voidable, hence invalid from its inception.[5]

B. Validity of Knutson Authorization

Next, Gens contends that the original and amended POCs submitted by RTC are invalid because Knutson was not authorized to act as agent for RTC. *See* Fed. R. Bankr.

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remedial, and neither it nor the federal rules of pleading require an election of substantive theories.").

[5] Furthermore, RTC had a legal obligation to file a POC against the Gens estate in order to preserve the position of Home Owners, which then held an unsecured claim against Gens. Finally, should Key repurchase the Gens Note, FDIC would realize no double recovery, since Key would become the claim holder of record. *See* Fed. R. Bankr. P. 3001(e)(2).

The "election of remedies" argument fails for yet another reason. Since the Trust and Gens did not default on the Gens Note until January 1990, Home Owners had no available remedy against Gens in 1989 when it filed its complaint against Key. The 1990 default by the Trust and Gens thus constituted a legal wrong distinct and severable from the breach of contract by Key.

P. 3001(b) ("A proof of claim shall be executed by the creditor or the creditor's authorized agent. . . . "); *see also* Fed. R. Bankr. P. 9010(a)(2). Gens asserts that it would have demonstrated, at an evidentiary hearing, that RTC regulations, *see* 12 C.F.R. § 1606.4; *see also* 12 U.S.C. § 1441a(n)(6), presumptively disqualified Knutson from serving as an RTC agent because, as an affiliate of Home Owners, presumably it was complicit in whatever financial misfeasance or malfeasance led to the Home Owners insolvency. As the bankruptcy court aptly noted, however, Gens lacked standing to challenge Knutson's agency status.

The RTC regulation pursuant to which Knutson was designated is designed (i) to "ensure that contractors [hired by RTC] meet minimum standards of competence, integrity, fitness, and experience and are held to the highest standards of ethical conduct in performing services for RTC," (ii) to prevent "the direct or indirect use of information gained through performance of a contract . . . for personal gain not contemplated by the contract," and (iii) to preclude "the use of personal relationships or improper influence to gain unfair competitive advantage in obtaining contracts with the RTC." 12 C.F.R. § 1606.1. The RTC regulation thus identifies two conceivable classes of intended beneficiaries: (1) *competing contractors* which are unfairly denied RTC contract bids; and (2) *the taxpaying public*, which may be harmed by RTC revenue losses resulting from "insider" conflicts of interest.

Gens plainly cannot qualify under the first classification, as she is not a competing contractor. *See, e.g., New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996) ("[U]nder the principle of *jus*

tertii, the plaintiff ordinarily 'must assert [her] own legal rights and interests, and cannot rest [her] claim to relief on the legal rights or interests of third parties.' ") (citation omitted). Moreover, no standing is conferred upon Gens, individually, by the generalized taxpayer benefit theme which actuates the second classification. *See Libertad v. Welch*, 53 F.3d 428, 436 (1st Cir. 1995) (noting that claimant normally may not adjudicate "abstract questions of wide public significance which amount to generalized grievances more appropriately addressed by the legislature"). Nothing in the statute, the RTC regulation or the attendant case law remotely suggests that Congress or the agency itself intended to confer standing on chapter 11 debtors to enforce the RTC regulation.[6] *See, e.g., Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1281 (1st Cir. 1996) (to demonstrate "standing," complainant must establish, *inter alia*, that her claim does not fall "outside the zone of interests protected by the specific law invoked") (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324-25, 82 L.Ed.2d 556 (1984)); *Benjamin v. Aroostook Med. Ctr., Inc.*, 57 F.3d 101, 104 (1st Cir. 1995).[7]

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[6] Furthermore, even assuming she had standing, Gens has alleged no facts suggesting that Knutson contributed either to Home Owners' insolvency or to any "substantial loss" occasioned RTC.

[7] Gens argues that the POCs filed by Knutson were invalid because they were not signed by RTC's attorney. *See* Fed. R. Bankr. P. 9010(a); 9011(a). *But see* Fed. R. Bankr. P. 3001(b) (POC may be signed by creditor or its authorized agent); *compare, e.g.*, Official Bankruptcy Form 1 (providing space for attorney signature) with Official Bankruptcy Form 10 (POC form providing no attorney-signature line). We need not resolve the present claim, however, since Gens concededly failed to raise it

C. Amendments to Original POC

Gens next contends that the bankruptcy court erred in permitting RTC to amend its original POC (*i.e.*, December 1993), which incorrectly stated that Knutson was the claim holder, without disclosing that it was acting as RTC's agent. Gens represents that she reasonably believed Knutson held no valid claim in its own right. Further, she argues, since RTC failed to file a POC in its own name prior to the bar date, there was no timely POC to be amended.

A bankruptcy court ruling allowing an amendment to a POC is reviewed for abuse of discretion, under three criteria:

> *First*, the proposed amendment must not be a veiled attempt to assert a distinctly new right to payment as to which the debtor estate was not fairly alerted by the original proof of claim. *Second*, the amendment must not result in unfair prejudice to other holders of unsecured claims against the estate. *Third*, the need to amend must not be the product of bad faith or dilatory tactics on the part of the claimant.

Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.), 954 F.2d 1, 10 (1st Cir. 1992) (citations omitted) (emphasis added). Leave to amend a POC should be "freely given when justice so requires." *See* Fed. R. Bankr. P. 7015.[8] The bankruptcy court did not abuse its discretion.

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in the bankruptcy court. *See Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915, 935 (1st Cir.), *cert. denied*, 510 U.S. 914 (1993).

[8] Bankruptcy Rule 7015 makes Fed. R. Civ. P. 15 (governing amendments to complaints) applicable in adversary

First, in order to "fairly alert" the debtor estate, a POC need only "provide[ ] adequate notice of the existence, nature, and amount of the claim as well as the creditor's intent to hold the estate liable." *Unioil, Inc. v. H.E. Elledge (In re Unioil, Inc.)*, 962 F.2d 988, 992 (10th Cir. 1992). The original POC, accompanied by a copy of the Gens Note, *see* Fed. R. Bankr. P. 3001(c), met the general notice requirement. As Knutson was duly authorized to file the original POC for RTC, *see supra* Section II.B, the mere failure to disclose Knutson's agency status in no sense affected the validity of the claim itself. As the Tenth Circuit correctly recognized in *Unioil*, a simple substitution of the real party in interest (*viz.*, RTC) for a related party mistakenly listed in the original POC (*viz.*, Knutson *qua* agent) represents a proper ground for amendment. *See Unioil*, 962 F.2d at 992 (permitting amendment where a trustee (rather than the trust) was incorrectly listed as creditor).[9]

Second, Gens points to no unfair prejudice from any deficiency in the original POC. *See Hemingway Transp.*, 954 F.2d at 10; *see also Unioil*, 962 F.2d at 993 (noting that

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proceedings. Although this case arose as a contested matter, rather than an adversary proceeding, Fed. R. Bankr. P. 9014 permits Bankruptcy Rule 7015 to be applied in contested matters. *In re Stavriotis*, 977 F.2d 1202, 1204 (7th Cir. 1992).

[9] Nor would the two remaining defects in the original POC bar amendment. First, as trustee for the Old Jail Trust, Gens had every reason to know that the original characterization of the POC, as "secured," was mistaken, since the first mortgagee already had foreclosed on the Barnstable Property securing the Gens Note. Second, the mistaken date assigned to the underlying debt instrument was a minor defect, given that the Gens Note itself was attached to the POC.

party opposing amendment must show actual prejudice). Instead, she suggests simply that allowing the RTC amendment prejudices unsecured creditors, who may receive less under any reorganization plan than would have been received were the FDIC claim not allowed. But the standard Gens proposes would preclude virtually any amendment, since it dispenses with the requirement that the debtor or trustee show "unfair" prejudice. Thus, something more than mere creditor disappointment is required to preclude amendment. *See In re Stoecker*, 5 F.3d 1022, 1028 (7th Cir. 1993); *In re Outdoor Sports Headquarters, Inc.*, 161 B.R. 414, 422 (Bankr. S.D. Ohio 1993); *In re Brown*, 159 B.R. 710, 716 n. 5 (Bankr. D.N.J. 1993); *In re Dietz*, 136 B.R. 459, 468-69 (Bankr. E.D. Mich. 1992).

Gens neither alleged nor demonstrated that any creditor acted in detrimental reliance on any representation or omission in the original POC. *See, e.g., Brown*, 159 B.R. at 716 (permitting POC amendment from unsecured to secured, given that "no evidence has been offered that anyone relied to their detriment upon the claims as originally filed"). Nor did Gens allege either bad faith or dilatory motive. Moreover, these RTC amendments occurred long before the formulation of a chapter 11 plan. *See Holstein v. Brill*, 987 F.2d 1268, 1270 (7th Cir. 1993) (characterizing confirmation of debtor plan as "passing milestone" that makes it more likely POC amendment may be prejudicial).

To be sure, Knutson demonstrated considerable laxity in executing its agency responsibilities, especially its seven-month delay in submitting amended proofs of claim. Were there some showing in these circumstances

that RTC gained a strategic advantage or that other parties in interest were unfairly prejudiced, the case for disallowance of the amended POCs would have been much stronger. Absent any such showing, however, the court did not abuse its discretion in permitting RTC to amend its original POC. "It is well accepted that the bankruptcy court is guided by the principles of equity, and that the court will act to assure that ' . . . substance will not give way to form, [and] that technical considerations will not prevent substantial justice from being done.' " *Pepper v. Litton*, 308 U.S. 295, 305 (1939) (citation omitted).

D. Impairment of Collateral

Lastly, Gens challenges the bankruptcy court ruling dismissing her "impairment of collateral" defense without first affording her an evidentiary hearing. She claimed that a prior holder of the Gens Note – presumably U.S. Funding – used $36,000 of the loan proceeds to pay off the preexisting second mortgage on the Barnstable Property, but failed to obtain and record the mortgage discharge. Thus, the mortgage securing the Gens Note remained third in priority, rather than climbing to second priority.

Pursuant to Mass. Gen. Laws. Ann. ch. 106, § 3-606(1)(b), "[t]he holder discharges any party to the [negotiable] instrument to the extent that without such party's consent the holder . . . unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse." An impairment of collateral may result if the

conduct of the holder of a collateralized negotiable instrument unjustifiably diminishes the physical value of the collateral, releases the collateral to the principal obligor before the loan is repaid, or fails to perfect its security interest in the collateral. *See Rose v. Homsey*, 197 N.E.2d 603, 605-06 (Mass. 1964); *see also Hawaii Broad. Co. v. Hawaii Radio, Inc.*, 919 P.2d 1018, 1029 (Haw. Ct. App. 1996); *White v. Household Fin. Corp.*, 302 N.E.2d 828, 835 (Ind. Ct. App. 1973). Nevertheless, in most jurisdictions a party asserting an "impairment of collateral" defense must prove she signed the negotiable instrument (*viz.*, promissory note) merely as an accommodation party for the principal debtor, rather than as a borrower. *See* James A. White & Robert S. Summers, *Uniform Commercial Code* §§ 13-16 (3d ed.1988).[10]

An accommodation maker is one "who signs the [negotiable] instrument in any capacity for the purpose of lending [her] name to another party to it," Mass. Gen. Laws. Ann. ch. 106, § 3-415(1). Frequently, accommodation parties sign debt instruments to enable the principal obligor to obtain a loan which would not have been

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[10] The latent confusion in this regard stems from the broad language in U.C.C. § 3-606, which refers to "*any party* to the [negotiable] instrument." *See FDIC v. Blue Rock Shopping Ctr., Inc.*, 766 F.2d 744, 749 (3d Cir. 1985) (outlining caselaw split). We have found no Massachusetts case which determines whether a nonaccommodation obligor on a promissory note may also invoke the U.C.C. § 3-606 defense. Since Gens and the bankruptcy court implicitly accepted the majority rule – that Gens must establish accommodation status – and because we affirm on an alternative ground, we need not address the unresolved Massachusetts-law question.

granted absent the accommodation. Although an accommodation party is liable to the lender under the debt instrument, her liability is that of a surety only. *Id.* cmt. 1. Thus, the accommodation maker reasonably expects that if called upon for payment following the principal obligor's default, she will be subrogated to the lender's rights against the principal obligor, including the right of recourse against any collateral securing the underlying debt instrument. *See id.* cmt. 5; *see also FDIC v. Blue Rock Shopping Ctr., Inc.*, 766 F.2d 744, 749 (3d Cir. 1985); *accord* Restatement of Security §§ 104, 141 (1941). Therefore, to the extent the holder of the debt instrument unjustifiably devalues or releases the collateral, or fails to perfect its rights in the collateral against third parties, the right of recourse may be diminished, thereby entitling the accommodation maker to a commensurate discharge from liability under the debt instrument. *See Blue Rock Shopping Ctr.*, 766 F.2d at 751.

The bankruptcy court considered Gens' second signature conclusive evidence that she had signed the Gens Note in her "individual" capacity, that is, as a principal coborrower rather than an accommodation maker. It also concluded that the purport of Gens' second signature on the Gens Note was not rendered ambiguous, either by the anterior designation of the Trust as the sole "Borrower" or the failure to designate a "Co-borrower."

Citing considerable case authority, Gens maintains that all accommodation makers necessarily sign promissory notes either in their "individual" or "representative" capacities. Consequently, she argues, these designations cannot conclusively resolve a signatory's

accommodation status.[11] Since the Gens Note must therefore be considered facially ambiguous, Gens argues that a hearing should have been conducted to consider parol evidence that the parties to the Gens Note (*viz.*, U.S. Funding, the Trust, and Gens) all understood that Gen's second signature was intended only as an accommodation endorsement. *See, e.g.*, Mass. Gen. Laws. Ann. ch. 106, § 3-415(3) (expressly allowing parol evidence of accommodation status except as to holders-in-due-course); *United Beef Co. v. Childs*, 27 N.E.2d 962, 964 (Mass. 1940) (same); *see also Butler v. NationsBank*, 58 F.3d 1022, 1027 (4th Cir. 1995) (outlining multi-factored, intent-based "purpose" and "proceeds" tests for determining accommodation status); *First Dakota Nat'l Bank v. Maxon*, 534 N.W.2d 37, 41-42 (S.D. 1995) (same).[12]

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[11] *See, e.g., FDIC v. Trans Pacific Indus., Inc.*, 14 F.3d 10, 12 (5th Cir. 1994) (rejecting FDIC's "attempts to nullify the import" of the "borrower" identification block in promissory note, which reflected corporation as sole borrower and did not designate corporate officer as coborrower).

[12] FDIC counters that 12 U.S.C. § 1823(e) (codification of *D'Oench, Duhme* doctrine) barred parol evidence of Gens' accommodation status, or that FDIC's status as a federal or state holder in due course barred Gens from invoking the U.C.C. § 3-606 defense. *See* Mass. Gen. Laws. Ann. ch. 106, § 3-415(3) ("As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such."). Since FDIC's right to invoke either doctrine in this case is open to serious question, we express no opinion on its contentions. *See, e.g., O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) (generally discouraging adoption of federal common-law rules especially protective of FDIC); *Varel v. Banc One Capital Partners, Inc.*, 55 F.3d 1016, 1021 (5th Cir. 1995) (*D'Oench* inapplicable where issue

Even were we to assume *arguendo* that Gens was entitled to an evidentiary hearing to determine whether she signed the Gens Note as an accommodation maker, she failed to set forth allegations which would establish the second essential element in her affirmative defense – a cognizable "impairment" of the collateral. *See RTC v. Feldman*, 3 F.3d 5, 9 (1st Cir. 1993) (appellate court may affirm on any ground supported by record), *cert. denied*, 510 U.S. 1163 (1994). As her section 3-606 defense is founded exclusively on the claim that her subrogation rights were frustrated, *supra*, Gens was required to do more than prove that U.S. Funding or another holder failed to obtain and record a mortgage discharge.[13]

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is not the enforceability of a secret, unwritten side agreement, but whether to allow parol evidence concerning the intendment of an ambiguous written contract provision); *Capitol Bank and Trust Co. v. 604 Columbus Ave. Realty Trust (In re 604 Columbus Ave. Realty Trust)*, 968 F.2d 1332, 1350-51 (1st Cir. 1992) (holding that FDIC is not entitled to federal holder-in-due-course status when acting in its capacity as receiver); *Calaska Partners Ltd. v. Corson*, 672 A.2d 1099, 1104 (Me. 1996) (FDIC as receiver of bulk purchaser not a holder in due course under state law); Mass. Gen. Laws. Ann. ch. 106, § 3-302(3) (denying holder-in-due-course status to party who acquired note "as part of a bulk transaction").

[13] Citing *Providence, Fall River & Newport Steamboat Co. v. Massachusetts Bay S.S. Corp.*, 38 F.2d 674 (D. Mass. 1930), Gens contends that the holder's mere failure to record a mortgage discharge warrants her total release from liability because the Barnstable Property obviously was of sufficient value to satisfy the Gens Note in July 1988, and the holder's failure to perfect its security interest unquestionably increased her *risk* of loss without her consent, even if no *actual* loss occurred. Since the cited case predates the adoption of the Massachusetts Uniform Commercial Code in 1958, it is both legally and factually

Section 3-606 plainly requires evidence that the holder's dereliction actually resulted in a loss to the accommodation party. *See* Mass. Gen. Laws. Ann. ch. 106, § 3-606 ("The holder discharges any party to the instrument *to the extent* . . . the holder . . . unjustifiably impairs [the] collateral. . . . ").[14] Gens alleged no facts which

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inapposite. *See id.* at 675 (noting that the court was "dealing not with the question how far a surety who has guaranteed the performance of a contract is released by subsequent alterations in it by the contracting parties, but with a change made by the creditor in the state of facts on which an independent contract of guaranty rests"); *cf. infra* note 14.

[14] Although we have found no Massachusetts case precisely in point, the clear majority trend among U.C.C. jurisdictions is to require the accommodation maker to prove actual loss from the impairment. *See, e.g., Alcock v. Small Bus. Admin.*, 50 F.3d 1456, 1462 (9th Cir. 1995) ("A clear majority of state courts place the burden on the guarantor to prove *actual prejudice* and limit the discharge to the extent of the impairment demonstrated.") (emphasis added); *Myers v. First State Bank of Sherwood*, 732 S.W.2d 459, 461 (Ark.) ("[T]he surety must prove two elements in order to be entitled to a discharge – 'that the holder of the note was responsible for the loss or impairment of the collateral, and the extent to which the impairment *results in loss.*' ") (emphasis added) (quoting *Van Balen v. Peoples Bank & Trust Co.*, 626 S.W.2d 205, 209-10 (Ark. Ct. App. 1981)), *modified on other grounds*, 741 S.W.2d 624 (Ark. 1987); *Bank South v. Jones*, 364 S.E.2d 281, 285 (Ga. Ct. App. 1987) ("[A] failure to perfect a lien on pledged corporate stock [does not] effect a discharge where it was shown that the stock had no value at the time the action [to collect on the debt] was commenced."); *Hurt v. Citizens Trust Co.*, 196 S.E.2d 349, 351 (Ga. Ct. App. 1973) (noting that appellant has "not shown how the failure to record the leases and assignments resulted in any damage"); *Rempa v. LaPorte Prod. Credit Ass'n*, 444 N.E.2d 308, 313 (Ind. Ct. App. 1983) (*see infra*); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 223 (Tex. 1992) ("If the creditor breaches his duty,

would demonstrate any actual diminution of her subrogation rights. *See FDIC v. Blanton*, 918 F.2d 524, 530 (5th Cir. 1990) (burden of proof is on party alleging discharge).

First, she did not allege that any creditor obtained a superior right of recourse against the Barnstable Property due to the fact that the preexisting second mortgage was never discharged of record. In addition, the auction sale of the Barnstable Property conducted pursuant to the first-mortgage foreclosure resulted in no surplus for application to any junior lien, including the second mortgage. Accordingly, the record can support no finding that any junior lien was impaired. Consequently, Gens' liability would not have been affected even if she had been able to establish that she signed the Gens Note as an accommodation maker. *See, e.g., Rempa v. LaPorte Prod. Credit Ass'n*, 444 N.E.2d 308, 313 (Ind. Ct. App. 1983)

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the surety is discharged on the note to the extent of his loss."); *Century 21 Prods., Inc. v. Glacier Sales*, 875 P.2d 1238, 1242 (Wash. Ct. App. 1994) ("Should a creditor impair the collateral, the surety will be discharged to the extent he is harmed by the impairment."), *rev'd on other grounds*, 918 P.2d 168 (Wash. 1996); *see generally* Carolyn Edwards, *Impairment of Collateral Under Section 3-606 of the Uniform Commercial Code*, 12 U. Dayton L. Rev. 509, 522 n.81 (1987) ("A number of courts have concluded that an unjustifiable impairment of collateral includes a failure to perfect a security interest if such failure results in a loss to the surety as subrogee."); *cf. also* Revised U.C.C. 3-605(f) (discharge for impairment of collateral only "to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay . . . if impairment had not occurred.").

("Thus, where the party asserting the impairment establishes that the creditor did not perfect its lien but fails to establish the extent to which that failure resulted in loss, the party has failed to establish its affirmative defense of *pro tanto* release.").[15]

III

CONCLUSION

Accordingly, the district court judgment is affirmed and costs are awarded to the appellee.

SO ORDERED.

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[15] Moreover, Gens merely alleged that no mortgage discharge was recorded. She did *not* allege that the $36,000, *see supra* p. 2, was never applied to the preexisting second mortgage. Therefore, assuming the underlying debt was in fact fully paid, it would seem extremely unlikely that the mortgagee or any of its assignees could have asserted a viable right to recourse against the Barnstable Property. *See, e.g., Beaton v. Land Court*, 326 N.E.2d 302, 307 (Mass.) (noting that "a court acting under general principles of equity jurisprudence has broad power to reform, rescind, or cancel written instruments, including mortgages," and that the discharging party could simply have brought suit to compel the mortgagee to cancel the note and "issue a discharge of mortgage in a form appropriate for recording"), *appeal dismissed*, 423 U.S. 806 (1975).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2009

In re: Helen D. Gens d/b/a
Helen Gens and Associates

HELEN D. GENS d/b/a
HELEN GENS AND ASSOCIATES,

Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Home Owners Savings Bank, F.S.B.,

Appellee.

MOTION OF FEDERAL DEPOSIT INSURANCE CORPORATION TO MODIFY OPINION

The Federal Deposit Insurance Corporation ("FDIC") hereby respectfully asks the Court to modify its opinion by amending or deleting Footnote 12. In support of this Motion, the FDIC states as follows:

In its opinion, this Court affirmed a district court order affirming a bankruptcy court order that allowed the FDIC to amend its proof of claim in Helen D. Gens' Chapter 11 bankruptcy. Among other things, the Court held that Gens failed to establish an "impairment of collateral" defense on the promissory note underlying the FDIC's proof of claim. Opinion, p. 17. In Footnote 12, the

opinion acknowledged but declined to address an alternative argument made by the FDIC to reach the same outcome on this issue, specifically, that extrinsic evidence of Gens' accommodation status on that promissory note would have been inadmissible. The footnote states:

> FDIC counters that 12 U.S.C. § 1823(e) (codification of *D'Oench Duhme* doctrine) barred parol evidence of Gens' accommodation status, or that FDIC's status as a federal or state holder in due course barred Gens from invoking the U.C.C. § 3-606 defense. *See* Mass. Gen. Laws. Ann. ch. 106, § 3-415(3) ("As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such." **Since FDIC's right to invoke either doctrine in this case is open to serious question**, we express no opinions on its contentions. . . .

Opinion, fn.12 at p. 17 (citations omitted) (emphasis added).

Read together with the previous sentence, the phrase "either doctrine" could be intended to include both 12 U.S.C. § 1823(e) and the federal common law *D'Oench Duhme* doctrine. Since *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), is the first case cited in support of the Court's observation, the footnote could be read to suggest that the FDIC's right to invoke that 12 U.S.C. § 1823(e) is open to question as a result of *O'Melveny*.

Such a suggestion would be incorrect, but it may inadvertently lead to confusion in other litigation involving

either the scope of the *O'Melveny* decision or the applicability of § 1823(e). *O'Melveny* addressed the circumstances in which the federal courts may create special rules of decision to protect unique federal interests involving the FDIC. Indeed, *O'Melveny* held that the FDIC, except in "few and restricted circumstances," is entitled only to the protections provided it in FIRREA. Clearly, however, this would not limit the applicability of section 1823(e) as amended by FIRREA.[1]

Despite the fact that *O'Melveny* dealt with the question of whether FIRREA precludes the creation of new federal common law, some courts have questioned the continued validity of the *D'Oench* doctrine after FIRREA. *See Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir 1995); *But see Motorcity of Jacksonville, Ltd. v. FDIC*, 83 F.3d 1317 (11th Cir. 1996) (en banc), *cert. granted and judgment vacated sub nom. Hess v. FDIC*, 117 S. Ct. 760 (1997). We are unaware, though, of any judicial decisions questioning the FDIC's right to invoke 12 U.S.C. § 1823(e) based on *O'Melveny*.

For this reason, the FDIC does not believe that this Court intended Footnote 12 to be construed as questioning, based on *O'Melveny*, the FDIC's right to invoke 12

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[1] The Court held that, when faced with a detailed statutory scheme, state law presumptively applies to matters not covered therein. 512 U.S. at 79 ("[M]atters left unaddressed in such a [detailed] scheme are presumably left to the state law."). The Court later explained that state law will be applied in the absence of a controlling statute except "where there is a 'significant conflict between some federal policy or interest and the use of state law.' " *Id.* at 87, citing *Wallis v. Pam American Petroleum Corp.* 384 U.S. 63, 68 (1966).

U.S.C. § 1823(e). Similarly, none of the other cases cited in Footnote 12 can be read as questioning this right.

Because of the risk that Footnote 12 could be construed incorrectly in other cases, we respectfully request that it be modified. A possible modification is to change the words "either doctrine" to "the *D'Oench Duhme* doctrine." In the alternative, we request that Footnote 12 be deleted from the opinion.

Respectfully submitted,

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Boston, MA 02108

Ann S. DuRoss
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Thomas L. Hindes
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/s/ Barbara Sarshik
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(202) 736-0192

May 21, 1997

CERTIFICATE OF SERVICE

I certify that on May 21, 1997, two (2) copies of the foregoing Motion to Modify Opinion of the Appellee, the Federal Deposit Insurance Corporation, were served on the following, postage prepaid, by United States mail:

Richard H. Gens, Esquire
900 Shoot Flying Hill Road
Centerville, MA 02632

/s/ Barbara Sarshik
Barbara R. Sarshik

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

In Re: HELEN D. GENS d/b/a
HELEN GENS and ASSOCIATES

Debtor/Appellant

vs. No. 96-2009

RESOLUTION TRUST CORPORATION
(FEDERAL DEPOSIT INSURANCE CORPORATION)

APPELANT'S [sic] OPPOSITION TO MOTION TO MODIFY OPINION

The appellant opposes Appellee's Motion to Modify the Opinion in the above entitled matter on the grounds that footnote 12 correctly states the opinion of the Court that neither *D'Oench Duhme*, at common law and as codified under 12 U.S.C. 1823(e), *and* its status as a holder in due course as grounds for barring the Appellant from invoking the U.C.C. #3-606 defense. The reference to "either doctrine" refers to the *D'Oench Dhume* doctrine on the one hand, and the holder in due course doctrine on the other hand, not the *D'Oench Dhume* common law doctrine and 12 U.S.C. [sic] 12 U.S.C. 1823(e).

Indeed the FDIC's right to invoke 12 U.S.C. 1823(e) is limited as a result of *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) which held, *inter alia*, that state law applies in the absence of a controlling federal statute unless there is a significant conflict between some federal policy or interest and the use of state law. *O'Melveny* reaffirms the preclusion of a federal common law.

Appellant intends to raise the issue of the creation of new federal common law in this case in its Petition for

Certiorari to the Supreme Court of the United States on the issue as to whether this Court should have followed the decisions of the Massachusetts cases on whether her collateral had been impaired under U.C.C. #3-606 and not deciding the issue based on the cases from other jurisdictions.

Therefore Appellant respectfully submits that the Opinion not be modified, nor the footnote stricken, as it accurately states the Opinion of the Court.

By her attorney,

/s/ Richard H. Gens
Richard H. Gens
(BBO#188920)
900 Shoot Flying Hill Road
Centerville, MA 02632
508-790-0666

CERTIFICATE OF SERVICE

I, Richard H. Gens, hereby certify that a true copy of the above document was served upon the Attorney of Record for each other party by mail on May 28, 1997.

/s/ Richard H. Gens

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2009

HELEN D. GENS,
Appellant,

v.

RESOLUTION TRUST CORPORATION,
Appellee.

ORDER OF COURT

Entered: May 28, 1997

Upon consideration of motion of Federal Deposit Insurance Corporation to modify opinion,

It is ordered that said motion is denied.

By the Court:

WILLIAM H. NG
Clerk.

[cc: Ms. Sarshik, Messrs. Agin, Scribman, Gens]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE HELEN D. GENS, d/b/a HELEN GENS AND ASSOCIATES Debtor/Appellant v. RESOLUTION TRUST CORP., now FEDERAL INSURANCE DEPOSIT CORP. Appellee	C.A. No. 96-10898-RCL

ORDER

Lindsay, District Judge.

After careful consideration of the appeal of the debtor/appellant, Helen D. Gens, the court AFFIRMS the Order of the Bankruptcy Court from which this appeal has been taken.

SO ORDERED.

/s/ Reginald C. Lindsay
UNITED STATES
DISTRICT COURT

DATED: 8/16/96

United States Bankruptcy Court

District of Massachusetts
PROCEEDING MEMORANDUM/ORDER

Hearing Date: 2/20/96

Helen Gens Case No. 93-18779 Ch. 11 AP No. ____

APPEARANCES:

For Debtor(s) Marshall Schribman
For Movant(s) _____
For Trustee _____
For Respondent(s) Warren Agin/RTC
For Plaintiff(s) _____
For Defendant(s) _____

NATURE OF PROCEEDING:

Motion for Relief from Stay #129 Supplemental Objection By Debtor
Motion for Adequate Protection/ Use of Cash Collateral _____
Disclosure Statement #132 Response By Resolution Trust
Confirmation _____
Motion for Authority to Sell/Notice of Intended Sale _____
#120 Objection(s) to Claims _____
Application(s) for Compensation _____
Action to Dismiss/Convert/Appoint Chapter 11 Trustee _____
Order to Show Cause _____
Pre-trial Conference _____

Trial _____

Motion(s) for Summary Judgment _____

Motion to Dismiss Complaint _____

OUTCOME _____

___ Granted ___ Approved ___ Sustained

___ Denied ___ Denied without Prejudice

___ Withdrawn 129, 120 Overruled ___ Order to Show Cause Released/Enforced

Continue to _____

Formal Order/Stipulation to be submitted by _____

Decision: Findings dictated on the record.

_____

_____

_____

_____

_____

DOCKETED

ENTERED
2/22/96

So Noted:
/s/ M.J. McFadyen
Courtroom Deputy

So Ordered:

/s/ Joan N. Feeney
United States Bankruptcy Judge

Date: 2/20/96

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

IN THE MATTER OF:	Case No. 93-18779
HELEN GENS	Boston, Massachusetts
Debtor.	February 20, 1996
	11:04 O'Clock A.M.
	11:12 O'Clock A.M.

TRANSCRIPT OF HEARING ON DEBTOR'S OBJECTION TO PROOF OF CLAIM OF RTC; DEBTOR'S SUPPLEMENTAL OBJECTION TO PROOF OF CLAIM OF RTC; RESPONSE BY RTC TO SUPPLEMENTAL OBJECTION BEFORE THE HONORABLE JOAN N. FEENEY, J.U.S.B.C.

APPEARANCES:

For the Debtor:	MARSHALL SCHRIBMAN, ESQ. 470 Atlantic Avenue, 11th Floor Boston, MA 02110
For Resolution Trust Corp. and FDIC:	WARREN AGIN, ESQ. Two Center Plaza Boston, MA 02108

Electronic Sound Recording Operator: Regina M. Brooks

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

GCI TRANSCRIPTION AND RECORDING SERVICES
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* * *

[p. 7] here specifically say you need an evidentiary hearing and now he says he doesn't want one.

THE COURT: Well, I don't think we need an evidentiary hearing.

MR. SCHRIBMAN: He says we can't produce them –

THE COURT: In my view, the debtor signed the note individually, and the reference typed in at the top does not change that, and I'm going to overrule the debtor's objection to the claim.

MR. SCHRIBMAN: We have a number of other –

THE COURT: I've reviewed them all, and I find that they lack merit. Specifically, Mass. General Laws Chapter 106, Section 3-606 does not apply because the holder of the claim in this case is the lender. I reviewed 12 CFR 1606.4, which you cite, and I find that the debtor does not have standing to make that claim. I've reviewed all of your objections and researched them and I find that they lack merit, and I'm overruling the debtor's objection and allowing the claim of the RTC as filed.

MR. SCHRIBMAN: For the record, Your Honor, if I could reiterate that we're still relying on our claim, which Your Honor has overruled, that the bar date bars the debtor's claim. I just want to state that for the record.

THE COURT: I understand that, and I find that it is appropriate to permit the RTC, now FDIC, to amend the [p. 8] claim that was originally mistakenly filed under the name of Knutson, the servicer. Okay. Thank you.

MR. AGIN: Your Honor, if I can have just ten seconds?

THE COURT: For what?

MR. AGIN: We have asked for sanctions under Rule 9011, especially in connection with the supplemental response.

THE COURT: I'm going to deny sanctions.

MR. AGIN: Thank you, Your Honor.

(End at Tape #1, Index #4913. 11:19 a.m.)

* * *

I certify that the foregoing is a true and accurate transcript of the proceedings electronically sound recorded on the above-entitled matter.

2-23-96
Date

/s/ Gloria C. Irwin
GLORIA C. IRWIN
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§ 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount except to the extent that –

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds –

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of –

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds –

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of –

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under

paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide.

(c) There shall be estimated for purposes of allowance under this section –

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that –

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or

disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim has become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim has arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed accordingly to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

Rule 3001
PROOF OF CLAIM

(a) Form and Content. A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

(b) Who May Execute. A proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005.

(c) Claim Based on a Writing. When a claim, or an interest in property of the debtor securing the claim is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(d) Evidence of Perfection of Security Interest. If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.

(e) Transferred Claim.

(1) *Transfer of Claim Other Than for Security Before Proof Filed.* If a claim has been transferred other than for security before proof of the claim has been filed, the proof of claim may be filed only by the transferee or an indenture trustee.

(2) *Transfer of Claim Other Than for Security After Proof Filed.* If a claim other than one based on a publicly traded note, bond, or debenture has been transferred other than for security after the proof of claim has been

filed, evidence of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 20 days of the mailing of the notice or within any additional time allowed by the court. If the alleged transferor files a timely objection and the court finds, after notice and a hearing, that the claim has been transferred other than for security, it shall enter an order substituting the transferee for the transferor. If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor.

(3) *Transfer of Claim for Security Before Proof Filed.* If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall be supported by a statement setting forth the terms of the transfer. If either the transferor or the transferee files a proof of claim, the clerk shall immediately notify the other by mail of the right to join in the filed claim. If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.

(4) *Transfer of Claim for Security After Proof Filed.* If a claim other than one based on a publicly traded note,

bond, or debenture has been transferred for security after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 20 days of the mailing of the notice or within any additional time allowed by the court. If a timely objection is filed by the alleged transferor, the court, after notice and a hearing, shall determine whether the claim has been transferred for security. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.

(5) *Service of Objection or Motion; Notice of Hearing.* A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise delivered to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing.

(f) Evidentiary Effect. A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

(g) To the extent not inconsistent with the United States Warehouse Act or applicable State law, a warehouse receipt, scale ticket, or similar document of the

type routinely issued as evidence of title by a grain storage facility, as defined in section 557 of title 11, shall constitute prima facie evidence of the validity and amount of a claim of ownership of a quantity of grain.

Rule 3002

FILING PROOF OF CLAIM OR INTEREST

(a) Necessity for Filing. An unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005.

(b) Place of Filing. A proof of claim or interest shall be filed in accordance with Rule 5005.

(c) Time for Filing. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code, except as follows:

(1) A proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief. On motion of a governmental unit before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the governmental unit.

(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may

extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proof of claim within 90 days after the mailing of the notice.

Rule 9010

REPRESENTATION AND APPEARANCES; POWERS OF ATTORNEY

(a) Authority to Act Personally or by Attorney. A debtor, creditor, equity security holder, indenture trustee, committee or other party may (1) appear in a case under

the Code and act either in the entity's own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

(b) Notice of Appearance. An attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney's name, office address and telephone number, unless the attorney's appearance is otherwise noted in the record.

(c) Power of Attorney. The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof of claim or the acceptance or rejection of a plan shall be evidenced by a power of attorney conforming substantially to the appropriate Official Form. The execution of any such power of attorney shall be acknowledged before one of the officers enumerated in 28 U.S.C. § 459, § 953, Rule 9012, or a person authorized to administer oaths under the laws of the state where the oath is administered.

Rule 9011

SIGNING AND VERIFICATION OF PAPERS

(a) Signature. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's

individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation of administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

(b) Verification. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

(c) Copies of Signed or Verified Papers. When these rules require copies of a signed or verified paper, it

shall suffice if the original is signed or verified and the copies are conformed to the original.

Chapter 106, Section 3-415.

(1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.

(2) When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation.

(3) As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof.

(4) An endorsement which shows that it is not in the chain of title is notice of its accommodation character.

(5) An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party.

Chapter 106, Section 3-606.

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or

agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharge such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary, or

(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

(2) By express reservation of rights against a party with a right of recourse the holder preserves

(a) all his rights against such party as of the time when the instrument was originally due; and

(b) the right of the party to pay the instrument as of that time; and

(c) all rights of such party to recourse against others.

Chapter 244, Section 17A.

Section 17A. Actions on mortgage notes, whether witnessed or not or on other obligations to pay a debt secured by mortgage of real estate, to recover judgments for deficiencies after foreclosure by sale under a power contained in the mortgage, and actions on such notes or other obligations which are subject to a prior mortgage, to recover the amount due thereon after the foreclosure by sale of such prior mortgage under power contained

therein, shall, except as hereinafter provided, be commenced within two years after the date of the foreclosure sale or, if the principal of the note or other obligation does not become payable until after the foreclosure sale, then within two years after the time when the cause of action for the principal accrues.

Such actions in cases where the foreclosure sale shall have occurred or the cause of action shall have accrued prior to January first, nineteen hundred and forty-six shall be commenced within two years after said date. Nothing in this section shall extend any other period of limitation.